

(iii) Individual test units comprising the test sample shall be randomly selected from the batch sample.

(iv) All random selection shall be achieved by sequentially numbering all of the units in a batch sample and then using a table of random numbers to select the units to be tested.

(5) *Test unit preparation.* (i) Prior to and during testing, a test unit selected in accordance with paragraph (a)(4) of this section shall not be prepared, modified, or adjusted in any manner unless such preparation, modification, or adjustment is allowed by the applicable DOE test procedure. One test shall be conducted for each test unit in accordance with the applicable test procedures prescribed in subpart B.

(ii) No quality control, testing or assembly procedures shall be performed on a test unit, or any parts and sub-assemblies thereof, that is not performed during the production and assembly of all other units included in the basic model.

(iii) A test unit shall be considered defective if such unit is inoperative or is found to be in noncompliance due to failure of the unit to operate according to the manufacturer's design and operating instructions. Defective units, including those damaged due to shipping or handling, shall be reported immediately to DOE. DOE shall authorize testing of an additional unit on a case-by-case basis.

(6) *Testing at manufacturer's option.* (i) If a manufacturer's basic model is determined to be in noncompliance with the applicable energy performance standard or water performance standard (in the case of faucets, showerheads, water closets, and urinals) at the conclusion of DOE testing in accordance with the double sampling plan specified in appendix B of this subpart, the manufacturer may request that DOE conduct additional testing of the model according to procedures set forth in appendix B of this subpart.

(ii) All units tested under paragraph (a)(6) of this section shall be selected and tested in accordance with the provisions given in paragraphs (a) (1) through (5) of this section.

(iii) The manufacturer shall bear the cost of all testing conducted under paragraph (a)(6) of this section.

(iv) The manufacturer shall cease distribution of the basic model being tested under the provisions of paragraph (a)(6) of this section from the time the manufacturer elects to exercise the option provided in this paragraph until the basic model is determined to be in compliance. DOE may seek civil penalties for all units distributed during such period.

(v) If the additional testing results in a determination of compliance, a notice of allowance to resume distribution shall be issued by the Department.

(b) *Design standard.* In the case of a design standard, a model is determined noncompliant by DOE after the Secretary or his designated representative has examined the underlying design information provided by the manufacturer and after the manufacturer has been offered the opportunity to verify compliance with the applicable design standard.

[54 FR 6080, Feb. 7, 1989, as amended at 63 FR 13321, Mar. 18, 1998]

§ 430.71 Cessation of distribution of a basic model.

(a) In the event that a model is determined noncompliant by DOE in accordance with § 430.70 of this part or if a manufacturer or private labeler determines a model to be in noncompliance, then the manufacturer or private labeler shall:

(1) Immediately cease distribution in commerce of the basic model;

(2) Give immediate written notification of the determination of noncompliance, to all persons to whom the manufacturer has distributed units of the basic model manufactured since the date of the last determination of compliance.

(3) Pursuant to a request made by the Secretary, provide DOE within 30 days of the request, records, reports and other documentation pertaining to the acquisition, ordering, storage, shipment, or sale of a basic model determined to be in noncompliance.

(4) The manufacturer may modify the noncompliant basic model in such manner as to make it comply with the applicable performance standard. Such modified basic model shall then be treated as a new basic model and must

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be certified in accordance with the provisions of this subpart; except that in addition satisfying all requirements of this subpart, the manufacturer shall also maintain records that demonstrate that modifications have been made to all units of the new basic model prior to distribution in commerce.

(b) If a basic model is not properly certified in accordance with the requirements of this subpart, the Secretary may seek, among other remedies, injunctive action to prohibit distribution in commerce of such basic model.

§ 430.72 Subpoena.

Pursuant to section 329(a) of the Act, for purposes of carrying out this part, the Secretary or the Secretary's designee, may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, records, papers, and other documents, and administer the oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of contumacy by, or refusal to obey a subpoena served, upon any persons subject to this part, the Secretary may seek an order from the District Court of the United States for any District in which such person is found or resides or transacts business requiring such person to appear and give testimony, or to appear and produce documents. Failure to obey such order is punishable by such court as a contempt thereof.

§ 430.73 Remedies.

If DOE determines that a basic model of a covered product does not comply with an applicable energy conservation standard or water conservation standard (in the case of faucets, showerheads, water closets, and urinals):

(a) DOE will notify the manufacturer, private labeler or any other person as required, of this finding and of the Secretary's intent to seek a judicial order restraining further distribution in commerce of such basic model unless the manufacturer, private labeler or any other person as required, de-

livers to DOE within 15 calendar days a statement, satisfactory to DOE, of the steps he will take to insure that the noncompliant model will no longer be distributed in commerce. DOE will monitor the implementation of such statement.

(b) If the manufacturer, private labeler or any other person as required, fails to stop distribution of the noncompliant model, the Secretary may seek to restrain such violation in accordance with section 334 of the Act.

(c) The Secretary shall determine whether the facts of the case warrant the assessment of civil penalties for knowing violations in accordance with section 333 of the Act.

[54 FR 6081, Feb. 7, 1989, as amended at 63 FR 13321, Mar. 18, 1998]

§ 430.74 Hearings and appeals.

(a) Pursuant to section 333(d) of the Act, before issuing an order assessing a civil penalty against any person under this section, the Secretary shall provide to such person notice of the proposed penalty. Such notice shall inform such person of that person's opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (c) of this section (in lieu of those in paragraph (b) of this section) apply with respect to such assessment.

(b)(1) Unless an election is made within 30 calendar days after receipt of notice under paragraph (a) of this section to have paragraph (c) of this section apply with respect to such penalty, the Secretary shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5, United States Code, before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(2) Any person against whom a penalty is assessed under this section may, within 60 calendar days after the date of the order of the Secretary assessing such penalty, institute an action in the United States Court of Appeals for the appropriate judicial circuit for judicial review of such order in accordance with